IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 5TH JUNE 2007 / 15TH JYAISHTA 1929

WP(C).No. 8928 of 2004(K)

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PETITIONER:

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ERANHOLI KOTARATH VEETTIL,
E.K.ALIHAJI, 42 YEARS,S/O.MUHAMMED HAJI,
EDAPPAL AMSOM, PERUMBARABU DESOM IN PONNANI TALUK.

BY ADV. SRI.K.P.MUJEEB

RESPONDENTS:

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1. PALLIKKATTIL SADANANDAN, 35 YEARS,
S/O.KUMARAN, VELAPPA, EDAPPAL AMSOM DESOM,
PONNANI TALUK.

2. PALLIKKATTIN SADANANDAN'S
WIFE VASANTHI, 30 YEARS, EDAPAL AMSOM , DESOM IN
PONNANI TALUK.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC : 8928 OF 2004

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF THE AGREEMENT PRODUCED BY THE PETITIONER BEFORE THE COURT.

EXT.P2 : TRUE COPY OF THE ORFER DT.11.02.04 IN OS NO.171 OF 2003 ON THE FILE OF THE COURT OF MUNSIFF-MAGISTRATE, PONNANI.

**PIUS C. KURIAKOSE, J.**

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W.P.(C) No. 8928 OF 2004

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Dated this the 5th day of June, 2007

**JUDGMENT**

The Writ Petition has been posted as defective on the reason that the 2nd respondent, 2nd defendant in the suit filed by the petitioner has not been served. I notice that it is a common written statement which was filed by both the respondents before the court below. In any event there is no conflict of interest between the respondents and the 1st respondent is capable of safeguarding the 2nd respondent's interest also. It is therefore ordered that it is not necessary to serve 2nd respondent separately. The order under challenge is Ext.P2 which was passed by the learned Munsiff when the petitioner put Ext.P1 agreement in evidence. The marking of the document was not permitted by the learned Munsiff taking the view that Ext.P1 is a bond and not an agreement. On reading through Ext.P1 what I find is that Ext.P1 records a pre-existing liability and it cannot be said that a liability is created for the first time by virtue of Ext.P1 alone. This is an essential test for distinguishing between bond and agreement. Of course, the document has got certain trappings of a bond also. The same is attested also by two witnesses. But it has been laid down by this Court in **Mathai Mathew v.Thampi** [1989 (1)KLT 138] that if the document is

capable of two constructions, the construction which is more favouable to the assessee shall be adopted. Since two constructions are possible on Ext.P1, the learned Munsiff should have considered Ext.P1 as an agreement. Ext.P2 is therefore set aside. The writ petition will stand allowed. The learned Munsiff is directed to mark Ext.P1 document as an agreement and continue with the trial of the suit.

**PIUS C. KURIAKOSE, JUDGE**

btt